

Rights Protection squared – How the CJEU and the ECtHR will get along in the future

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On Monday, only two days after the [royal wedding](#), a [conference](#) with a highly distinguished band of legal professionals turned to the more civilian question of EU rights litigation: current and former judges of European and national courts, representatives of States and of the EU as well as legal scholars reported on and discussed future challenges to the pluralized fundamental rights protection within Europe. With the entry into force of the Lisbon Treaty in 2009 the European lawyer can now choose from a confusing, multi-layered normative system: There are the national fundamental rights, the four freedoms of the European internal market, the fundamental rights deriving from the case-law of the CJEU, the rights and principles laid down in the Charter of Fundamental Rights of the European Union, as well as the freedoms of the European Convention on Human Rights after the EU's long-awaited accession.

The difficult accession of the EU to the ECHR

Viviane Reding, the Commissioner for Justice, Fundamental Rights and Citizenship, reminded the audience in her keynote speech of the EU's promise to accede to the ECHR. Art. 6 paragraph 2 TEU imposes an obligation on the EU to achieve this end – and consequently binds the EU Member States to support this step. The Commissioner stated that, from her point of view, the conduct of the United Kingdom in the accession process was particularly frustrating. After thirty years of struggle, she explained, this step would finally close a gap within the European framework of fundamental rights protection. Reding strongly advocated the view that coherence between the European Legal Orders is possible only with a pan-European minimum standard of fundamental rights.

[Hannes Kraemer](#), Representative for the Commission in the ECHR accession negotiations, gave an account of the difficulties that have arisen in the negotiations for bilateral agreement between the EU and the 47 State parties to the Council of Europe. Though the [2011 Draft Accession Agreement](#) still serves as a basis for political agreement, the

parties have returned to the negotiating table: Regard is to be taken of some of the States' requests for modifications. Especially two concerns will be addressed. First, the proper design of the "joint responsibility" between the EU and its Member States. Second, the CJEU prior involvement procedure. Furthermore, some of the contracting States place great value on seeing the provisions formulated in a manner that would make it impossible to interpret them as recognizing the EU as being some kind of State entity. This is a status that is to be reserved for the contracting states alone. But the EU also has some work to do. It is necessary, for instance, to develop internal rules that lay down the actual procedure for appointing three candidates for the ECtHR judicial office and those that govern the question of who should represent the EU in proceedings before the ECtHR. While Kraemer expressed optimism as to a rapid conclusion of the negotiations, other speakers like Hans Nilsson from the Council of the EU do not expect the accession to enter into force until the end of the decade.

CJEU Advocate General Eleanor Sharpston dared a glance into the future with respect to how the CJEU jurisprudence might converge with that of the ECtHR. She thereby referred to the doctrine of the margin of appreciation that has been developed by the ECtHR. This doctrine takes into consideration historical, cultural, and social characteristics of the Member States and, thus, affords them some leeway in the implementation of Convention rights. First, Advocate General Sharpston noted that such a concept is rather strange to genuine European Law, which has been primarily concerned with the realization of the internal market. After all, the ECHR is the foundation of mere cooperation between its Member States whereas the EU "constitutes a new legal order of international law". The dissolution of the former EU pillar system, however, could entail certain changes: The "Europeanization" of politically sensitive areas such as Police and Judicial Co-operation in Criminal Matters would make it more likely that the ECtHR's margin of appreciation could be imported into the CJEU's jurisprudence. Second, Advocate General Sharpston called attention to possible detrimental effects that might arise if the planned prior involvement was to be done in the urgent procedure in order to prevent protraction of ECtHR proceedings. The prior involvement shall enable the CJEU to examine the compatibility of EU law particularly with the ECHR before the ECtHR rules on the issue. In the urgent procedure the Member States may not respond before the CJEU, which is why she (as has been suggested by the Council of Europe) would prefer the slower, so-called accelerated procedure for prior involvement of the CJEU. Hannes Kraemer coolly remarked that this was exactly the Working Group's position.

Pick and choose

The conference also addressed potential conflicts within the European framework of fundamental rights – be it between rights or courts. Herwig Hofmann, co-organizer of the conference and Professor in Luxemburg, discussed the relation between those fundamental rights deriving from the CJEU's jurisprudence to those now expressly established in the European Charter on Fundamental Rights. The existence of both as sources of fundamental rights of equal rank might lead to the situation that the very same fundamental right bears different contents – a problem yet to be solved by the CJEU.

Hofmann left open whether the Charter rights should enjoy precedence over the unwritten ones developed by the CJEU, but argued that for reasons of legal certainty and legitimate expectations that the more concretized rights should be applied before the more abstract ones – whether they are written or unwritten. This notion was, in principle, supported by CJEU Judge Sacha Prechal. She emphasized that – by all means – she welcomes a pluralized protection of fundamental rights in order to provide the CJEU with the flexibility to find the appropriate solution for individual cases. In the context of the horizontal effect of EU fundamental rights, her colleague Allan Rosas called for caution towards a "droit-de-l'hommeisme".

Karlsruhe-Bully v. Bränn-Dummy

Jan Passer, a Judge on the Czech Supreme Administrative Court, concluded the program by taking a look at the European compound of fundamental rights from a Member State's perspective. More courts and rights would not necessarily lead to an increase of (legal) protection. International guarantees, he explained, are often meant to

afford less protection since they embody only the least common denominator. Thus, courts in the European multilevel system have to pick between a more competitive or a more complementary relationship towards their counterparts. Here, Judge Passer told the story of the [ultra vires decision of the Czech Constitutional Court](#), not even trying to hide his skepticism and wonder. The Court outdid its great “role model” from Karlsruhe, determined as it was to preserve its judicial powers. In this regard, Judge Prechal, as one of the judges having sat on the bench of that CJEU decision with which the CCC took odds, remarked that the case had been “poorly pleaded” by the Czech government – a more thorough justification of the Czech pension system could well persuade the Court to come to a different conclusion, a new opportunity that another preliminary procedure makes possible.

[Tom Eijsbouts](#), Professor at Leiden University, openly enjoyed acting as devil’s advocate defending the view of the Czech Constitutional Court. From his stance, the Court was by no means a mere “dummy” trotting after its Karlsruhe counterpart, which always pretends to be the “bully on the block”. While the Czech Court displayed intelligent reasoning, the German judges steered themselves into a dead-end of “state, democracy, Volk”. The courageous Czech approach, he argued, at least opens space for judicial dialogue.

These accounts represented just the highlights of a very dense and intensive conference having taken place on the marvelous premises of the [Musée d’Art Moderne Grand-Duc Jean](#). A long line of European-Law-VIPs gave exciting insight into their everyday practice and thinking. We left determined to continue to cut through the thicket of European human rights protection.

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